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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROSCOE LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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FILED

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

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I

STATEMENT OF THE CASE

On September 27, 1967, a ten-count indictment was returned by the Federal Grand Jury naming Appellant Roscoe Lewis (hereinafter referred to as Lewis or defendant), Curtis Thelma Stephens and Anthony Dio Bowser as defendants for their participation in three sales of heroin to Federal Bureau of Narcotics Agent Charles Henry. Lewis was named in Counts One through Six. Stephens and Bowser are not involved in this appeal, since the record shows that Stephens plead guilty to Counts One and Four and Bowser was a fugitive (R. T. 38, 52-58).<sup>1/</sup>

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<sup>1/</sup> "R. T." refers to Reporter's Transcript.



On November 29 and November 30, 1967, a court trial was held before the Honorable A. Andrew Hauk, United States District Judge. Defendant was found guilty on Count Six of the Indictment which charged a violation of Title 26, United States Code, Section 4705(a) (R. T. 247). He was acquitted on Counts One through Five; Counts One, Two, Four and Five charged violations of Title 21, United States Code, Section 174. Count Three charged a violation of Title 26, United States Code, Section 4705(a).

On December 21, 1967, defendant was sentenced to a term of seven years and a notice of appeal in forma pauperis was filed (R. T. 329).

On this appeal, Lewis does not dispute the sufficiency of the evidence to convict him of a violation of Title 26, United States Code, Section 4705(a). Instead he challenges the constitutionality of the statute.

The evidence showed that Lewis, Stephens and Bowser were present during a conversation at Stephens' home concerning the purchase of heroin by Agent Henry on September 5, 1967 (R. T. 99, 100). Later that day, Agent Henry called Stephens and they agreed to meet at a bowling alley. Mr. Lewis came into the bowling alley and brought Agent Henry to a pickup truck where Stephens was waiting. Agent Henry entered the truck and sat between Lewis and Stephens. Stephens handed a package containing heroin to Agent Henry in exchange for \$150.00 in the presence of Lewis. Stephens and Lewis agreed to make a future



sale to Agent Henry "in a couple of days." (R. T. 101-102).

On September 7, 1967, Agent Henry called the defendants to discuss another purchase of heroin. The telephone was answered by Lewis who brought Stephens to the phone. Later that day, Agent Henry again called the same number and spoke to Lewis. Agent Henry testified:

"I asked Mr. Lewis would it be possible for me to meet him at the bowling alley again, and he said yes. I told him that I would be there at approximately 3:25 or 3:30 that day. He said, 'We will be there.' " (R. T. 104-106).

After some delays, defendant Lewis arrived at the bowling alley in the same pickup truck as was used on September 5, 1967. Lewis told Agent Henry that Stephens was waiting at a nearby taco stand. During the ride to that location, Lewis and Agent Henry had a conversation concerning a future purchase of cocaine. Defendant was agreeable but indicated that he did not have a "good connection" at that time (R. T. 107-108).

Stephens entered the pickup truck and handed a bag of heroin to Agent Henry in exchange for government money. The three men then discussed future purchases for large amounts of heroin and cocaine (R. T. 109-110).

The evidence also showed that neither defendant requested a written order form for the purchase of heroin from Agent Henry at the time of the two transactions and no order form was





ever exchanged (R. T. 142-143).

The Government introduced as Exhibit 3 a copy of the standard order form issued by the Secretary of the Treasury for legal transactions under Title 26, United States Code, Section 4705(a). Agent Frank Sojat of the Federal Bureau of Narcotics testified that this is the only type of order form for 4705(a) transfers (R. T. 180). He also testified that this form could be used for heroin and that it is the form for the transfer of opium derivatives. Heroin is an opium derivative (R. T. 195-198).

The trial court granted a motion for a judgment of acquittal on Counts One, Two and Three (R. T. 210-211). A motion for judgment of acquittal on Counts Four, Five and Six was denied after extensive argument (R. T. 211-221).

Defendant called Stephens as a witness who testified that defendant had never personally handled the heroin on September 7, 1967, the date of the transaction, alleged in Counts Four, Five and Six (R. T. 230-231).

The Court found the defendant not guilty on Counts Four and Five, apparently because the evidence did not show that defendant handled the heroin (R. T. 237-243). Defendant was found guilty on Count Six (R. T. 243-247).



## ARGUMENT

Defendant's entire brief is an attack on the constitutionality of Title 26, United States Code, Section 4705(a). This statute requires a seller of narcotic drugs to obtain from the buyer an order on a form issued by the Secretary of the Treasury prior to any sale. It is analagous to the every-day requirement that a customer or patient (buyer) present a prescription (order form) from a doctor (Secretary of the Treasury) before a pharmacist (seller or defendant in this case) sells narcotic drugs.

The statute has been in effect in substantially its present form since the Harrison Narcotic Drug Act of 1914, and thousands of prosecutions have occurred under it. No court has ever held it unconstitutional.

Defendant challenges the statute on the following grounds:

1. That it is an unconstitutional exercise of the taxing power,
2. That it violates his privilege against self-incrimination, and
3. That it requires the performance of an impossible act.

These challenges are inter-related but will be separated for discussion.



SECTION 4705(a) IS AN INTEGRAL PART OF  
A STATUTORY SCHEME BASED ON A VALID  
CONGRESSIONAL EXERCISE OF THE TAXING  
POWER

---

Defendant's initial challenge is his claim that the statute is not a valid exercise of the taxing power. Any discussion of this point must begin with a recognition of the fact that the Supreme Court upheld the statute on this very ground in United States v. Doremus, 249 U.S. 86 (1918). See Nigro v. United States, 276 U.S. 332 (1928). Defendant has cited no case and the Government has found none which overrules Doremus.

Defendant's contention on this point actually overlaps his contention that the statute violates his privilege against compulsory self-incrimination, since there can be no question that Congress may tax virtually any activity. The question is whether Congress has exercised its taxing power in a way which forces an individual to incriminate himself.

Defendant states that there is no tax on heroin. However, heroin is a derivative of opium and all opium derivatives are taxed at the rate of \$.01 per ounce or fraction of an ounce. See 26 United States Code, Section 4701(a) and 26 United States Code, Section 4731.

A Government report shows that 170,000 kilograms of opium were legally imported during the year 1966. Traffic in Opium and Other Dangerous Drugs, United States Treasury





Department, Bureau of Narcotics, page 43 (1966). The same report shows that over \$1,365,000 in taxes, fines and other revenue were collected on narcotic drugs and marihuana during that year. Id. at 45.

In any event, defendant is not being prosecuted for his failure to pay any taxes. He is charged with the specific failure to obtain from a purchaser an order form for the sale of narcotics. His argument on this question is really a claim that the statute is an unconstitutional exercise of the taxing power because compliance results in compulsory self-incrimination.

## II

### SECTION 4705(a), AS APPLIED TO LEWIS, DOES NOT VIOLATE HIS PRIVILEGE AGAINST SELF - INCRIMINATION

---

Lewis' primary contention is that his conviction for sale of narcotics without obtaining the requisite order form from the buyer violated his privilege against self-incrimination. The relevant statute, Section 4705(a) of Title 26, United States Code, prohibits any sale of narcotic drugs unless the buyer furnishes "a written order . . . on a form . . . issued in blank for that purpose by the Secretary or his delegate." In support of his contention that compliance with this statutory requirement would have incriminated him thus rendering this Section unconstitutional, Lewis cites three recent United States Supreme Court cases, Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United





States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

Marchetti, Grosso and Haynes expressly derived their basic rationale from Albertson v. S.A.C.B., 382 U.S. 70 (1965). In Albertson, the statutory requirement that Communist party members complete and file a registration form was held violative of the Fifth Amendment's prohibition of compulsory self-incrimination. The focal point of the Albertson decision was the finding that Communist registration statutes, rather than being "neutral on their face and directed at the public at large", were "directed at a highly selective group inherently suspect of criminal activities." Albertson thus enunciated the standard that the Court was to follow in subsequent cases. Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965); See, Marchetti, supra, at 47; Grosso, supra, at 64; Haynes, supra, at 96.

Adhering to Albertson, the Court in Marchetti and Grosso, found that registration and tax requirements imposed on gamblers violated the Fifth Amendment. The fact that gambling was illegal in forty-nine states meant that registration requirements aimed at this selective group amounted to little more than a purposeful plan to gather evidence from citizens in order to aid in securing their convictions.

"Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use



in their prosecution. "

390 U.S. at 74 (Justice Brennan concurring)

Similarly, in Haynes, compulsory registration of only those types of firearms (sawed-off weapons, machine guns, silencers) commonly used in illegal pursuits by a "selective group inherently suspect of criminal activities" was found violative of the Fifth Amendment.

"These limitations [length of weapon, silencers, etc] . . . were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation . . . . It is pertinent to note that the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments to the Act, stated that the 'primary purpose of [the Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the ganster-type element.' "

390 U.S. at 87-88, N. 4

In striking down these regulatory provisions, the Court applied the general Fifth Amendment standard that to be invalid there must be a "real and appreciable" hazard of self-incrimination in the registration scheme. Grosso, supra, at 67; Rogers v.



United States, 340 U.S. 367, 374 (1951). The Court made clear that such danger was found because, as in Albertson, rather than registration provisions aimed at effecting regulation of non-criminal as well as criminal activity ("neutral on their face and directed at the public at large") these regulations were designed to ferret out and coerce information from one selective group -- those engaged in illegal activities.

Lewis' reliance on these cases is misplaced unless somehow he can show that within their prohibitory ambit is included the acquisition of a form by a person other than the seller-defendant, namely the buyer. And, as will be seen, infra, even if the Fifth Amendment privilege were thus held "negotiable" no real and appreciable hazard of incrimination exists nor is Section 4705(a) "directed at a highly selective group inherently suspect of criminal activities".

1. Lewis, As Buyer, Was Not Himself Compelled To Acquire An Order Form Nor To Divulge Any Incriminatory Information.
- 

The order form provision under which Lewis was convicted is designed to effectuate the congressional purpose that sales of narcotics be made only to authorized purchasers. The purchaser, never the seller, is under an obligation to apply for and obtain the order form and submit the required information. The only requirement imposed by Section 4705(a) upon the seller is that he not sell until the buyer provides a written order form obtained from the Government. Unlike the situations in Albertson,





Marchetti, Grosso and Haynes, the seller is not required to pay any tax, submit any information to the Government, or file any registration application. Thus, Section 4705(a) compelled nothing of Lewis; accordingly, the privilege against compulsory self-incrimination could not have been violated. Support for this conclusion is found in the leading post-Marchetti case, deciding that Section 4705(a) does not violate the Fifth Amendment.

"The statutory language makes manifest . . . that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form. Even if we were to assume arguendo that the . . . purchaser's Fifth Amendment rights [are infringed] . . . it hardly follows that a seller . . . is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer . . . . [I]t is clear that standing under the Fifth Amendment is not freely negotiable nor transferable."

United States v. Minor, (2d Cir.) No. 31953.

July 3, 1968, at 2954-55.

Insofar as Lewis intimates that the privilege would be





violated by the administrative regulation requiring the seller to file and keep the buyer's order form in his possession, it should be a sufficient answer that Lewis was not charged with violation of this regulation. Even if this were not so and if other provisions were to be found constitutionally suspect, Section 4705(a) can be effectively enforced apart from these other provisions, thus freeing it from constitutional impediment. See Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 348 (1936), (concurring opinion of Justice Brandeis), cited in Haynes, supra, at 92. It should also be noted that 26 U. S. C. §7852(a) provides:

"If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be affected thereby. "

2. Applying The Constitutional Guidelines Of Recent Supreme Court Decisions, Section 4705(a) Does Not Evidence A Statutory Scheme Creating Substantial Risk of Self-Incrimination.

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Even viewing Section 4705(a) in the light of Lewis' fictitious vicarious shifting of the possibility of incrimination from buyer to seller, that Section's validity is not affected by the recent Supreme Court decisions discussed above. Those cases were cases where defendants were compelled to give incriminating information demanded by statutory schemes aimed only at



select groups known for their criminal activity. In effect, the statutes struck down by the Court were primarily concerned with "asking all thieves in the room to stand up." In sharp contrast, Section 4705(a) is aimed primarily at the regulation of the legitimate market in narcotics:

"Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for lawful medical purposes; such as physicians, hospitals, pharmacists, retailers, and others."

Report on the Traffic in Opium and Other

Dangerous Drugs, 1966, Bureau of Narcotics, (hereinafter cited as "Annual Report")

The multi-million dollar narcotics business is, to a large extent, legal. This vast legal industry is actively regulated by the Federal Bureau of Narcotics during all stages of legitimate distribution, pursuant to comprehensive and interrelated statutes and regulations. See, e. g., 21 C.F.R., Parts 302-307. Through the order form and registration provisions of the narcotics laws, the Bureau closely regulates the domestic distribution among importers, manufacturers, wholesalers, retailers, medical practitioners, hospitals and researchers. That these provisions are designed to regulate legitimate transactions in narcotic drugs is borne out by the fact that, as of December 1966, there were



394,193 registrants under the narcotics laws who were authorized to obtain written order forms from the Government and engage in legitimate transactions in narcotic drugs. See 1966 Annual Report, supra, at 44. Rather than a group "inherently suspect" of criminal activities, this group of nearly 400,000 registrants, contained only one person who was charged with a federal narcotics violation in 1966. See 1966 Annual Report, supra, at 10. Thus, these order forms and other related provisions are regulatory in nature, providing legal methods and procedures for carrying on the legal business of sale and distribution of narcotic drugs.

That the order form provisions of the federal narcotic laws are designed to legitimize, not to incriminate, is substantiated by the case law in this area. The United States Supreme Court has found that:

"These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of any attempted dealing in, or selling of, the drug free from the tax . . . to punish him for this misuse of the order form is not to punish him for not recording his own crime. "

Nigro v. United States, 276 U.S. 332, 346-51 (1928).

In the recent Second Circuit case of United States v. Minor, supra, Section 4705(a) was held not to violate a heroin seller's Fifth Amendment privilege, because only the buyer was required





to apply for a form. The Court went on to uphold the statute as applied to a heroin seller, distinguishing it from the statutes in Marchetti, Grosso and Haynes:

"And, we believe that §4705(a) serves an important function within the statutory scheme . . . requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes . . . . Section 4705(a) ensures that narcotics do not fall into the hands of those who, for one reason or another, cannot satisfy the registration requirements of Section 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs . . . .

"In Marchetti and Grosso the Court placed great emphasis on the wide prohibition against gambling under both federal and state law . . . and stressed that the gambling statutes were directed at a 'selective group inherently suspect of criminal activities' . . . the firearm registration statutes before the Court in Haynes had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes . . . .





"Section 4705(a), on the other hand, cannot be said to be directed primarily at those 'inherently suspect of criminal activities' . . . . [I]t was one section of an important and significant statutory scheme regulating the conduct of a lawful business."

United States v. Minor, (2d Cir.) No. 31953,  
July 3, 1968, at 2957-60.

Prior to Marchetti, Grosso and Haynes, this Court upheld the statutory order form requirements relating to the sale of marihuana, 26 U.S.C. §4742(a); Browning v. United States, 366 F.2d 420, (9th Cir. 1966). See also Riuz v. United States, 328 F.2d 56 (9th Cir. 1964). It should be noted that in these cases, this Court was faced with similar self-incrimination contentions as proposed here by Lewis and that the order form provision for marihuana is essentially the same as Section 4705(a).

On the same day that certiorari was granted in Marchetti, certiorari was denied for a marihuana case in which similar Fifth Amendment issues were decided adversely to the defendant. Rule v. United States, 362 F.2d 215 (5th Cir. 1966), cert. denied 385 U.S. 1018 (1967).

After the Marchetti, Grosso and Haynes decisions, Section 4705(a) was found constitutional in the Second Circuit Minor case, supra. The Fifth Circuit upheld the constitutionality, on the same grounds as Minor, of the order form requirement for marihuana sales, even though there the buyer was the defendant. Leary v.



United States, 392 F.2d 220 (5th Cir. 1968), cert. granted 392 U.S. 903 (1968). Similarly, Judge Wyzanski has recently upheld the marihuana order form's constitutionality under the Fifth Amendment. United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968). See also United States v. Reyes, 280 F.Supp. 267 (S.D. N.Y. 1968); c.f. United States v. McGee, 282 F.Supp. 550 (N.D. Tenn. 1968).

Lewis, in essence, fictitiously poses a statute which requires a seller to submit incriminating evidence, such requirement having as its target the illegal sale of narcotics by the select group of those involved in such criminal activity. No such statute is at issue. In fact, there can be no case of registration of any illegal narcotics sale, simply because any request for an order form would be denied. Illegality thus precludes registration. This contrasts sharply with the Marchetti-Grosso situation where gamblers engaged in illegal activity were compelled to register and thereby incriminate themselves. There, illegality was in effect the factor prompting the registration requirement. Under Section 4705(a), incrimination, far from being "a real and appreciable hazard" is quite impossible -- i. e. , since order forms are reserved for legal sales of narcotics, they will necessarily be absent in illegal sales; they cannot incriminate in such sales. This follows from the fact that Section 4705(a) is designed to legitimize sales rather than record illegal sales.



### III

#### NON-ISSUANCE OF ORDER FORMS FOR ILLEGAL SALES OF HEROIN DOES NOT PRECLUDE PROSE- CUTION OF LEWIS PURSUANT TO SECTION 4705(a)

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1. It Is Essential To Governmental Regulation  
Of Narcotics That Heroin Not Be Excepted  
From Such Regulation.
- 

Lewis too easily comes to the conclusion that heroin is entirely distinct from other narcotic drugs and thus its regulation cannot be viewed the same as the regulation of other narcotics. Heroin (diacetyl morphine) is an opium derivative which is created from morphine. When left standing for long periods, heroin hydrolyzes and breaks down into morphine (and two acidic acid radicals) again. [See R. T. at 204] Thus, it belies the facts to intimate that regulation of the vast, often lawful, narcotics trade is distinct from regulation of the trade in heroin, indisputably a narcotic drug (See 26 U. S. C. §4731) derived from morphine. There is only one order form for the transfer of narcotic drugs; that there has been no known recent, lawful trade in the one form of opium derivative which Lewis illegally sold should not provide justification for treating the order form provision differently in relation to one opium derivative than to another.





2. Due Process Is Not Offended By Applying Section 4705(a) To Heroin Transfers, Since That Section Operates Essentially The Same As All Licensing Statutes.
- 

Lewis contends that since order forms are not known to have been recently issued to validate heroin sales, conviction for the sale of heroin without the form requires the performance of an impossible act. This contention is an obfuscation of the basic mechanics of criminal statutes. Lewis' severance of a heroin sale situation from other narcotics sales situations has no logical basis. If a licensed dealer in, e. g., morphine, were to sell to an illegal narcotics peddler and was then convicted of sale not pursuant to a Section 4705(a) order form, under Lewis' rationale, he could successfully claim that, since order forms are never issued to illegal peddlers, the morphine seller was convicted for failure to perform an impossible act.

All states require drivers of motor vehicles to first acquire a license from the state. Blind persons can never receive such licenses. Under Lewis' rationale, a blind man convicted of driving without a license could successfully contend that his conviction was based on his non-performance of an impossible act.

Lewis' contention is contrary to decisions of the United States Supreme Court and of this Court. The Supreme Court has held that sale to a buyer who "cannot obtain an order blank because not of the class to which such blanks are allowed to be issued" does not make the prohibition of such sale unconstitutional. Webb v.





United States, 249 U.S. 96, 99 (1919). This Court has rejected the similar argument that because it was impossible to pay the tax on marihuana in his illegal situation, defendant could not be convicted for not acquiring the order form. Browning v. United States, supra, at 422.

As enacted and applied, Section 4705(a) forbids transactions that are not authorized by compliance with federal prerequisites. Lewis engaged in a course of conduct for which he had no authority, and in this was exposed himself to criminal sanction. It is irrelevant whether his buyer could not have obtained the authority which would have legitimized these dealings, for Congress has chosen to outlaw the black market in narcotics conducted by persons who are not within any of the classes specified for lawful trade in narcotics. The Government regards this case as essentially indistinguishable from prosecution of a person who practices law or medicine without a license. It would certainly be no defense to such a prosecution that the individual did not and could not meet the standards and prerequisites for permission to engage in such callings lawfully. Lewis' conviction is based on the forbidden act of transferring narcotics without falling in to the class of persons that the Government permits to transfer narcotics. His ineligibility to be included in this class and his consequent ineligibility to obtain the form from the buyer does not provide him with justification for engaging in the conduct prohibited by Section 4705(a). The fact of his ineligibility to sell heroin, rather than constituting an



impossible dilemma, left Lewis with the choice of refraining from such sale and thereby avoiding prosecution.

### CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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